

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-03-DL-229
)	
Paulino Bernal Evangelism ¹)	
KBRN(AM))	NAL/Acct No. 200432500001
Boerne, Texas)	FRN 0005733662

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 2006

Released: August 25, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny a petition for reconsideration filed by Paulino Bernal Evangelism (“*Evangelism*”), former licensee of AM broadcast station KBRN, Boerne, Texas.² *Evangelism* filed for reconsideration of a Bureau *Forfeiture Order*³ issued to *Evangelism* on October 19, 2004, in the amount of twenty-five thousand dollars (\$25,000) for willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Commission’s Rules (“*Rules*”).⁴ The noted rule violations involve *Evangelism*’s failure to maintain a main studio in its community of license, failure to install and maintain operational Emergency Alert System (“*EAS*”) equipment during the hours of station operation, and failure to make the station’s public inspection file available.

II. BACKGROUND

2. On October 28, 2003, an agent from the Commission’s Dallas, Texas, Field Office (“*Dallas Office*”) inspected station KBRN in Boerne, Texas. The agent could find no local or toll free telephone number for station KBRN and was unable to locate its main studio. The agent did locate KBRN’s transmitter tower and the shed containing its transmitting equipment but found that they were situated on private property behind locked fences and were inaccessible. Subsequently, *Evangelism*’s technical representative advised the agent that the transmitter shed served as KBRN’s main studio and that the only person working for KBRN in Boerne, Texas, was an unpaid volunteer who would make KBRN’s public inspection file available upon request. The agent contacted the unpaid volunteer and stated he wanted to inspect KBRN’s public inspection file. The volunteer provided access to KBRN’s transmitter shed but, when asked to provide the station’s public inspection file, produced transmitter information and technical manuals, and stated that no other documentation for station KBRN was available.

¹ The *Forfeiture Order* was captioned “Paulino Bernal Evangelism, Inc.” Paulino Bernal Evangelism has informed us that “Inc.” is not part of its name. We have changed the caption accordingly.

² The license for KBRN was assigned to Gerald Benavides on June 25, 2004 (See File No. BAL-20040322ADY, granted May 10, 2004).

³ *Paulino Bernal Evangelism, Inc.*, 19 FCC Rcd 19922 (Enf. Bur. 2004) (“*Forfeiture Order*”).

⁴ 47 C.F.R. §§ 73.1125, 11.35(a) and 73.3527(c)(1).

3. On December 19, 2003, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”), to Evangelism proposing a monetary forfeiture of \$25,000 for apparent willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Rules.⁵ In its response to the NAL, Evangelism argued that it did not violate the public inspection file requirement and that the proposed forfeiture should be reduced or cancelled on the basis of its inability to pay and history of overall compliance. In the Bureau *Forfeiture Order*, we rejected these arguments and imposed a monetary forfeiture of \$25,000 for willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Rules. In its petition for reconsideration, Evangelism argues that it did not violate the main studio and public inspection file requirements; that, if it violated the Rules, there is no evidence that the violations were repeated; that it has a history of overall compliance; that imposition of a forfeiture against Evangelism would be “contrary to Commission policy” because donors would be the ultimate source of payment; and that payment of a forfeiture would limit its “ability to generate programming in the public interest.”⁶

III. DISCUSSION

A. Violation of Section 73.3527(c)(1) of the Rules (Public File Requirement)

1. Background

4. The public file requirements codified in Part 73 of the Rules⁷ are rooted in Section 307(b) of the Communications Act of 1934, as amended, (“Act”).⁸ Section 73.3527(a)(2) of the Rules requires that every permittee or licensee of an AM, FM, or TV station operating in the noncommercial educational broadcast services shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(11) and paragraph (e)(12) of that section.⁹ Section 73.3527(b) of the Rules requires the public inspection file be maintained at the station’s main studio.¹⁰ Section 73.3527(c)(1) of the Rules requires the file be available for public inspection at any time during regular business hours.¹¹ The Commission has found that reasonable access to the public inspection file serves the important purpose of facilitating citizen monitoring of a station’s operations and public interest performance, and fostering community involvement with local stations, thus helping to ensure that stations are responsive to the needs and interests of their local communities.¹²

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432500001 (Enf. Bur., Dallas Office, rel. Dec. 19, 2003).

⁶ Petition for Reconsideration, pp. 2-7.

⁷ See 47 C.F.R. §§ 73.3526 and 73.3527 for commercial and noncommercial licensees, respectively.

⁸ 47 U.S.C. § 307(b). This section requires the Commission to make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same.

⁹ 47 C.F.R. § 73.3527(a)(2).

¹⁰ 47 C.F.R. § 73.3527(b).

¹¹ 47 C.F.R. § 73.3527 (c)(1).

¹² *Review of the Commission’s Rules regarding the Main Studio Rule and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691, 15700 (1998) (“*Main Studio Rule and Public Inspection Files*”) recon. granted in part; 14 F.C.C.R. 11113 (1999); see also *Union Broadcasting, Inc.*, 19 FCC Rcd 18588, 185890 (Enf. Bur. 2004); *Lebanon Educational Broadcasting Foundation*, 21 FCC Rcd 1442, 1444 (Enf. Bur. 2006) (*Memorandum Opinion and Order*).

2. Discussion

5. Evangelism again claims that there was no public file violation. Evangelism asserts that the KBRN's public file was "at all times relevant to this matter . . . available at the KBRN studio"; that Evangelism's unpaid volunteer at KBRN had limited facility in speaking and understanding English, and was nervous and did not understand that the agent had requested the public file; and that the unpaid volunteer would have provided KBRN's public file if the FCC agent remained at the KBRN studio "for a more reasonable period of time" or explained his request for the public file "in a more reasonable fashion."¹³

6. We reject Evangelism's arguments. It was Evangelism's responsibility to make any necessary arrangements to have the public file available at all times during KBRN's regular business hours.¹⁴ KBRN's unpaid volunteer did not provide the public file upon the agent's request. Furthermore, the file was unavailable to the public at all times because there was no staff or management presence at the KBRN studio.¹⁵ We affirm, therefore, the *Forfeiture Order's* determination that Evangelism violated Section 73.3527(c)(1) of the Rules.

B. Violation of Section 73.1125 of the Rules (Main Studio)

1. Background

7. In carrying out the mandate of Section 307(b) of the Act, the Commission has established a regulatory regime for distributing broadcast service in which every radio and television station is assigned to a community of license with a primary obligation to serve that community.¹⁶ A central component of this regulatory regime requires that a broadcast station's main studio be accessible to its community of license.¹⁷

8. Section 73.1125 of the Rules requires the licensee of a broadcast station to maintain a main studio at one of the following locations: (1) within the station's community of license; (2) at any location within the principal community contour of any AM, FM or TV broadcast station licensed to the station's community of license; or (3) within 25 miles from the reference coordinates of the center of its community of license. In adopting the main studio rule, the Commission stated that the station's main studio must have the capability to serve the needs and interests of the residents of the station's community of license.¹⁸ To fulfill this function, a station, among other things, must maintain a meaningful presence at its main studio.¹⁹ The Commission has defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel.²⁰ The licensee need not have the same staff person and manager at the studio, as

¹³ Petition for Reconsideration, at 5.

¹⁴ *Mahoning Valley Broadcasting Corporation*, 39 FCC 2d 52, 63 (1972); see also Section 73.3527(c)(1) of the Rules.

¹⁵ See *NAL* at ¶¶ 2, 3, 6.

¹⁶ *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215, 3215 (1987), *clarified*, 3 FCC Rcd 5024, 5026 (1988).

¹⁷ *Main Studio Rule and Public Inspection Files*, 13 FCC Rcd at 15692.

¹⁸ *Id.* at 15693; see also *Main Studio and Program Origination Rules*, 2 FCC Rcd at 3217-3218.

¹⁹ *Main Studio and Program Origination Rules*, 2 FCC Rcd at 3217-3218.

²⁰ *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615, 3616 (1991), *clarified*, 7 FCC Rcd 6800 (1992) ("*Jones Eastern*").

long as there is management and staff presence there during normal business hours.²¹ Although management personnel need not be “chained to their desks” during normal business hours, they must “report at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a home base.”²²

2. Discussion

9. Evangelism argues that it satisfied the main studio requirement because of “the presence of the licensee’s representative . . . and of the public file.”²³ Evangelism had only an unpaid volunteer who was not present at Evangelism’s transmitter shed when an FCC agent initially attempted to inspect it and who came to the transmitter shed only after the agent contacted him.²⁴ This minimal presence clearly did not satisfy the requirement for a meaningful presence at the main studio.²⁵ We affirm, therefore, the *Forfeiture Order’s* determination that Evangelism violated Section 73.1125 of the Rules.

C. Downward Adjustment Factors

1. Background

10. The *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules²⁶ permit downward adjustment of forfeitures on the basis of a minor violation, good faith or voluntary disclosure, history of overall compliance or inability pay as well as other factors within the discretion of the Commission and its staff.

2. Discussion

a. History of Overall Compliance

11. Evangelism again seeks reduction or cancellation of the forfeiture by arguing that as of October 28, 2003, it had no prior offenses. We previously rejected this claim in the *Forfeiture Order* because, in addition to the violations involving KBRN, there was a violation involving station KUOL (AM), San Marco, Texas, which is licensed to SM Radio, Inc. (“SM”), a company under the same ownership as Evangelism.²⁷ Evangelism now argues that SM’s violation should not be considered in determining whether Evangelism has a history of overall compliance for the following reasons: Paulino Bernal, 100 percent owner of SM, did not own Evangelism; SM and Evangelism are distinct entities; SM’s violation occurred nearly simultaneously with Evangelism’s offenses and, therefore, was not a “prior offense”; and there has been no final determination in *SM Radio, Inc.*²⁸

²¹ *Id.*, 6 FCC Rcd at 3616 n.2; 7 FCC Rcd at 6800 n.4.

²² *Jones Eastern*, 7 FCC Rcd at 6802.

²³ Petition for Reconsideration, p. 5.

²⁴ See *NAL*, ¶ 3, 4.

²⁵ See, e.g., *Pilgrim Communications, Inc.*, 20 FCC Rcd 14314, 14315 (Enf. Bur. 2004) (main studio rule violation found where licensee failed to establish that there was a management level person employed at the station at the time of the inspection).

²⁶ 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II, Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment Criteria.

²⁷ See *SM Radio, Inc.*, 19 FCC Rcd 24812, *application for review pending* (Enf. Bur. 2004) (“*SM Radio, Inc.*”).

²⁸ Petition for Reconsideration, pp. 2-4.

12. First, the ownership report on file at the time of Evangelism's violations indicates Paulino Bernal owned 100 percent of Evangelism. Second, although SM and Evangelism are legally distinct entities, we find that, having the same owner at the time of the violations, they were so closely related that it is appropriate to consider SM's violation in determining whether Evangelism has a history of overall compliance. Third, offenses need not be "prior" to be considered in determining whether there is a history of overall compliance.²⁹ Finally, we can consider violations occurring in cases where there has been no final determination.³⁰ We affirm, therefore, the *Forfeiture Order*'s determination that Evangelism has presented no history of overall compliance.

b. Other Arguments

13. Evangelism argues that, because the FCC inspected station KBRN on only one occasion, there is no evidence that any of the violations specified in this proceeding were repeated.³¹ We reject this claim. All of the violations specified in this proceeding are, by their nature, continuing violations and Evangelism has made no claim that they occurred on only one day.³²

14. Evangelism asserts that its revenues consist of donations by listeners, who would be the ultimate source of any forfeiture payment, and that imposition of a forfeiture against Evangelism would, therefore, be "contrary to Commission policy."³³ Evangelism provides nothing to support this claim and, in fact, the Commission has no such policy.³⁴

15. Evangelism also contends that payment of a forfeiture would limit its "ability to generate programming in the public interest."³⁵ Evangelism used a similar argument to support a financial hardship claim that we rejected in the *Forfeiture Order*.³⁶ Although Evangelism does not explicitly argue that payment of the forfeiture would cause a financial hardship, the argument that payment of a forfeiture would limit Evangelism's "ability to generate programming in the public interest" is, in effect, a claim of financial hardship for which Evangelism still has not provided the required documentation.³⁷ Accordingly, we reject this argument.

²⁹ See *JMK Communications, Inc.*, 19 FCC Rcd 16111, 16114 (Enf. Bur. 2004) (No history of overall compliance found when licensee committed additional violations following the violations on which forfeiture was based.) JMK's additional violations resulted in a *Forfeiture Order*. *JMK Communications, Inc.*, 19 FCC Rcd 24808 (Enf. Bur. 2004), *petition for reconsideration granted in part and denied in part*, 21 FCC Rcd 1427 (Enf. Bur. 2006).

³⁰ *Id.* at 16114.

³¹ *Petition for Reconsideration*, pp. 6-7.

³² As provided by 47 U.S.C. § 312(f)(2), a violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991).

³³ *Petition for Reconsideration*, p. 7.

³⁴ See *Broadcast Learning Center, Inc.*, 19 FCC Rcd 9285, 9287 (Enf. Bur. 2004) (no reduction of forfeiture on basis that licensee's station "is a non commercial educational station with a good portion of our revenue coming from individual donations").

³⁵ *Petition for Reconsideration*, p. 7.

³⁶ *Forfeiture Order* at 19923.

³⁷ The *NAL* informed Evangelism, at paragraph 15, that the Commission would not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices

(continued....)

IV. CONCLUSION

16. We have considered the forfeiture amount and we have examined Evangelism's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act³⁸ and Section 1.80 of the Rules and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* as well.³⁹ As a result of our review, we find that Evangelism willfully and repeatedly violated Sections 73.1125 and 73.3527(c)(1) of the Rules and that neither cancellation nor reduction of the monetary forfeiture is appropriate.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act⁴⁰ and Section 1.106 of the Rules,⁴¹ Evangelism's petition for reconsideration of the *Forfeiture Order* **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

18. Payment of the forfeitures shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.⁴² Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, SW, Room 1A625, Washington, D.C. 20554.⁴³

19. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Barry D. Wood, Wood, Maines & Brown, Chartered, 1827 Jefferson Place, N.W., Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

(...continued from previous page)

("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.

³⁸ 47 U.S.C. § 503(b)(2)(D).

³⁹ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁴⁰ 47 U.S.C. § 405.

⁴¹ 47 C.F.R. § 1.106.

⁴² 47 U.S.C. § 504(a).

⁴³ *See* 47 C.F.R. § 1.1914.